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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 JAMES R. MEDICRAFT,

12 Plaintiff,

13 v.

14 DEREK P. LEUZZI, *et al.*,

15 Defendants.

16 CASE NO. 2:20-cv-01145-JCC-JRC

17 ORDER REGARDING
18 ELECTRONICALLY STORED
19 INFORMATION

20 This matter is before the Court on the parties' proposed order regarding electronically stored information ("ESI"). Dkt. 13. After identifying significant departures from the Court's model ESI order, the undersigned provided the parties with the version of the parties' ESI agreement that the undersigned intended to adopt. Dkt. 15. The parties were given until January 8, 2021, to inform the Court whether they objected to the modified ESI order.

21 No party has objected to the ESI Order, as amended by the undersigned. Defendants
22 have filed a notice of no objection. *See* Dkt. 16. Plaintiff informed the Court on December 31,

1 2020, that he had no objection, either, although plaintiff did not file any notice of no objection in
2 the case.

3 Therefore, the Court adopts the ESI order set forth below.

4 **ORDER REGARDING ELECTRONICALLY STORED INFORMATION**

5 Plaintiff James Medicraft, *pro se*, and Defendants, by and through their counsel of
6 record, stipulated to certain provisions regarding the discovery of electronically stored
7 information (“ESI”) in this matter. The Court adopts most of the stipulated agreement, but with
8 modifications as set forth below:

9 **A. General Principles**

10 1. An attorney’s zealous representation of a client is not compromised by
11 conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation
12 to cooperate in facilitating and reasonably limiting discovery requests and responses raises
13 litigation costs and contributes to the risk of sanctions.

14 2. The proportionality standard set forth in Fed. R. Civ. P. 26(b)(2)(C) must
15 be applied in each case when formulating a discovery plan. To further the application of the
16 proportionality standard in discovery, requests for production of ESI and related responses should
17 be reasonably targeted, clear, and as specific as possible.

18 **B. ESI Disclosures**

19 Within 30 days after the Court rules on Defendants’ Motion for Partial Dismissal,
20 or at an earlier time if agreed to by the parties, each party shall disclose:

21 1. Custodians. The five custodians most likely to have discoverable ESI in
22 their possession, custody, or control. The custodians shall be identified by name, title, connection
23 to the instant litigation, and the type of the information under his/her control.

1 2. Non-custodial Data Sources. A list of non-custodial data sources (*e.g.*,
 2 shared drives, servers), if any, likely to contain discoverable ESI.

3 3. Third-Party Data Sources. A list of third-party data sources, if any, likely
 4 to contain discoverable ESI (*e.g.*, third-party email and/or mobile device providers, “cloud”
 5 storage, etc.) and, for each such source, the extent to which a party is (or is not) able to preserve
 6 information stored in the third-party data source.

7 4. Inaccessible Data. A list of data sources, if any, likely to contain
 8 discoverable ESI (by type, date, custodian, electronic system, or other criteria sufficient to
 9 specifically identify the data source) that a party asserts is not reasonably accessible under Fed.
 10 R. Civ. P. 26(b)(2)(C)(i).

11 **C. Preservation of ESI**

12 The parties hereto acknowledge that they have a common law obligation, as expressed in
 13 Fed. R. Civ. P. 37(e), to take reasonable and proportional steps to preserve discoverable
 14 information in the party’s possession, custody, or control. With respect to preservation of ESI,
 15 the parties agree as follows:

16 1. Absent a showing of good cause by the requesting party, the parties shall
 17 not be required to modify the procedures used by them in the ordinary course of business to back-
 18 up and archive data; provided, however, that the parties shall preserve all discoverable ESI in
 19 their possession, custody, or control.

20 2. All parties shall supplement their disclosures in accordance with Fed. R.
 21 Civ. P. 26(e) with discoverable ESI responsive to a particular discovery request or mandatory
 22 disclosure where that data is created after a disclosure or response is made (unless excluded under
 23 (C)(3) or (D)(1)-(2) below).

- 1 3. Absent a showing of good cause by the requesting party, the following
2 categories of ESI need not be preserved:
- 3 a. Deleted, slack, fragmented, or other data only accessible by forensics.
4 b. Random access memory (RAM), temporary files, or other ephemeral data
5 that are difficult to preserve without disabling the operating system.
6 c. On-line access data such as temporary internet files, history, cache,
7 cookies, and the like.
8 d. Data in metadata fields that are frequently updated automatically, such as
9 last-opened dates (see also Section (E)(5)).
10 e. Back-up data that are duplicative of data that are more accessible
11 elsewhere.
12 f. Server, system or network logs.
13 g. Data remaining from systems no longer in use that is unintelligible on the
14 systems in use.
15 h. Electronic data (*e.g.*, email, calendars, contact data, and notes) sent to or
16 from mobile devices (*e.g.*, iPhone, iPad, Android, and Blackberry
17 devices), provided that a copy of all such electronic data is automatically
18 saved in real time elsewhere (such as on a server, laptop, desktop
19 computer, or “cloud” storage).

20 **D. Privilege**

- 21 1. A producing party shall create a privilege log of all documents fully
22 withheld from production on the basis of a privilege or protection, unless otherwise agreed or
23 excepted by this Agreement and Order. Privilege logs shall include a unique identification number
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1 for each document and the basis for the claim (attorney-client privileged or work-product
2 protection). For ESI, the privilege log may be generated using available metadata, including
3 author/recipient or to/from/cc/bcc names; the subject matter or title; and date created. Should the
4 available metadata provide insufficient information for the purpose of evaluating the privilege
5 claim asserted, the producing party shall include such additional information as required by the
6 Federal Rules of Civil Procedure. Privilege logs will be produced to all other parties [no later than
7 30 days before the deadline for filing motions related to discovery] unless an earlier deadline is
8 agreed to by the parties.

9 2. Redactions need not be logged so long as the basis for the redaction is clear
10 on the redacted document.

11 3. With respect to privileged or work-product information generated after the
12 filing of the complaint, parties are not required to include any such information in privilege logs.

13 4. Activities undertaken in compliance with the duty to preserve information
14 are protected from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

15 5. Pursuant to Fed. R. Evid. 502(d), the production of any documents in this
16 proceeding shall not, for the purposes of this proceeding or any other federal or state proceeding,
17 constitute a waiver by the producing party of any privilege applicable to those documents,
18 including the attorney-client privilege, attorney work-product protection, or any other privilege
19 or protection recognized by law. Information produced in discovery that is protected as privileged
20 or work product shall be immediately returned to the producing party, and its production shall not
21 constitute a waiver of such protection if: (i) such information appears on its face to have been
22 inadvertently produced; or (ii) the producing party provides notice within 15 days of discovery
23 by the producing party of the inadvertent production.

1 **E. ESI Discovery Procedures**

2 1. On-site inspection of electronic media. Such an inspection shall not be
3 required absent a demonstration by the requesting party of specific need and good cause or by
4 agreement of the parties.

5 2. Search methodology. The parties shall timely attempt to reach agreement
6 on appropriate search terms, or an appropriate computer- or technology-aided methodology,
7 before any such effort is undertaken. The parties shall continue to cooperate in revising the
8 appropriateness of the search terms or computer- or technology-aided methodology.

9 In the absence of agreement on appropriate search terms, or an appropriate
10 computer- or technology-aided methodology, the following procedures shall apply:

11 a. A producing party shall disclose the search terms or queries, if any,
12 and methodology that it proposes to use to locate ESI likely to contain discoverable information.
13 The parties shall meet and confer to attempt to reach an agreement on the producing party's search
14 terms and/or other methodology.

15 b. If search terms or queries are used to locate ESI likely to contain
16 discoverable information, a requesting party is entitled to no more than 5 additional terms or
17 queries to be used in connection with further electronic searches absent a showing of good cause
18 or agreement of the parties. The 5 additional terms or queries, if any, must be provided by the
19 requesting party within 14 days of receipt of the producing party's production.

20 c. Focused terms and queries should be employed; broad terms or
21 queries, such as product and company names, generally should be avoided. Absent a showing of
22 good cause, each search term or query returning more than 250 megabytes of data are presumed

1 to be overbroad, excluding Microsoft PowerPoint files, image and audio files, and similarly large
2 file types.

3 d. The producing party shall search both non-custodial data sources
4 and ESI maintained by the custodians identified above.

5 3. Format. The parties agree that ESI will be produced to the requesting party
6 with searchable text, in a format to be decided between the parties. Acceptable formats include,
7 but are not limited to, native files, multi-page TIFFs (with a companion OCR or extracted text
8 file), single-page TIFFs (only with load files for e-discovery software that includes metadata
9 fields identifying natural document breaks and also includes companion OCR and/or extracted
10 text files), and searchable PDF. Unless otherwise agreed to by the parties, files that are not easily
11 converted to image format, such as spreadsheet, database, and drawing files, should be produced
12 in native format.

13 4. De-duplication. The parties may de-duplicate their ESI production across
14 custodial and non-custodial data sources after disclosure to the requesting party.

15 5. Metadata fields. In the absence of good cause shown, the parties agree
16 metadata need not be disclosed. Upon a showing of good cause, or as otherwise ordered by the
17 Court, the parties agree only the following metadata fields need be produced: document type;
18 custodian and duplicate custodians; author/from; recipient/to, cc and bcc; title/subject; file name
19 and size; original file path; date and time created, sent, modified and/or received; and hash value.

20 Dated this 12th day of January, 2021.



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22 J. Richard Creatura
23 United States Magistrate Judge
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